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Supreme Court of the United States
October Term, 1970

No. 1720

NICK F. DE MARTINO and JEAN DE MARTINO,

Appellants,

v.

OLGA SCARPETTA and SPENCE-CHAPIN ADOPTION SERVICE,

Appellees.

MOTION TO DISMISS

Appellee Olga Scarpetta moves to dismiss the appeal on the following grounds:

1. The judgment of the State Court rests on adequate non-federal grounds.

2. The appeal does not present a substantial federal question.

Statement

The facts of this habeas corpus proceeding and appeals are substantially set forth in the opinion of the Court of Appeals of the State of New York attached to appellants' Jurisdictional Statement at page 16, as Appendix A.

Appellants state (J.S., pp. 1-2) that they are appealing from so much of the final judgment or order of the Court of Appeals of New York as denied the application of the appellants for leave to intervene as parties in the appeal pending before the New York Court of Appeals, and that their appeal also seeks review of so much of the order and remittitur of the Court of Appeals entered April 7, 1971, Appendix A, as affirms the denials by the Supreme Court, New York County and the Appellate Division, First Department, of the Supreme Court of the State of New York, of applications by the appellants herein for leave to intervene in the respective proceedings before those courts.

Appellants apparently do not appeal from those portions of the remittitur of the Court of Appeals, entered April 7, 1971, which affirms the decision of the Appellate Division and the Supreme Court, New York County granting custody of the infant Scarpetta to Appellee Olga Scarpetta (hereinafter referred to as Scarpetta).

Appellants' motion to the New York Court of Appeals to amend the order denying intervention and its remittitur (J.S., p. 3) was denied on or about May 26, 1971.

Statement

The infant Scarpetta, born May 18, 1970, was surrendered for adoption to Appellee Spence-Chapin Adoption Service (hereinafter referred to as Spence-Chapin), on or about June 1, 1970, and on June 18, 1970 Spence-Chapin placed the infant Scarpetta with the appellants for adoption. Five days later, on June 23, 1970, Scarpetta repented her action and requested that her child be returned to her (J.S., p. 18). The infant Scarpetta has never been adopted by the appellants, and contrary to what is stated (J.S., p. 5) custody of the infant Scarpetta has never been in appellants, but was in Spence-Chapin until the order and judgment of the Supreme Court, New York County, dated November 20, 1970 and entered November 24, 1970, which granted custody of the infant Scarpetta to Appellee Scarpetta (Appendix B).

Following the decision and the remittitur of the New York Court of Appeals, a judgment and order was entered on April 28, 1971 directing that the appellants deliver the infant Scarpetta to the appellee, Scarpetta. A copy of said order and judgment of April 28, 1971 is attached hereto as Appendix C.

By order of the Hon. Charles A. Loreto, dated May 27, 1971, and entered May 28, 1971, in the New York County Supreme Court, the appellants were ordered to deliver the infant Scarpetta to the temporary custody of appellee, Spence-Chapin, within forty-eight hours after service of a copy of the said order on their attorneys, and by certified mail to their last known address in New York.

Statement

Said order was served on May 28, 1971. A copy of said order is attached hereto as Appendix D. Appellants have not delivered said infant either to appellee, Scarpetta, or appellee, Spence-Chapin, and are now in contempt of said court order.

According to statements made in the press and on television by the appellants, appellants moved their domicile from Kings County in New York to Florida on or about May 1, 1971, where they presently reside with the infant Scarpetta.

Argument

I.

THE COURT OF APPEALS DECISION WHICH DENIED THE APPELLANTS LEAVE TO INTERVENE IN THE HABEAS CORPUS PROCEEDINGS BETWEEN APPELLEE SCARPETTA AND APPELLEE SPENCE-CHAPIN RESTS ON AN INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT IT.

Appellants sought to intervene in the New York Court of Appeals in the habeas corpus proceeding between appellee Scarpetta, the natural mother of the infant Scarpetta and the appellee Spence-Chapin, the adoption agency to whom she had surrendered her child, as a matter of law pursuant to CPLR 1012(a)(2)(J.S., pp. 28-29). Section 1012(a)(2) of the New York Civil Practice Law and Rules states in part:

Argument

"Upon timely motion, any person shall be permitted to intervene in any action:

* * *

2. When the representation of the person's interest by the parties is, or may be, inadequate, and the person is, or may be, bound by the judgment; or * * *."

The opinion by the Court of Appeals (J.S., p. 29) states that it is contrary to the public policy of the State of New York to disclose the names and identities of the natural parents and the prospective adoptive parents to each other, referring to Sections 111 (4) and 112 (4) of the New York Domestic Relations Law.

The opinion further states that Sections 383 and 384 of the Social Services Law (referred to as the Social Welfare Law in appellants' Jurisdictional Statement) are also reflective of this settled public policy, and that since the relationship under Section 384 is exclusively between the natural parent and the adoption agency, and the legislature has not deemed it appropriate for the prospective adoptive parents to be parties to the proceeding pursuant to Section 383, the agency acts as an insulating intermediary, insuring, by the separation of the natural parents and the prospective adoptive parents, the secrecy necessary to prevent the strife and harrassment that could be caused by a parent who institutes a proceeding merely to learn the identity of the prospective adoptive parents.

The opinion further points out (J.S., pp. 29-30) that to allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to the disclosure of the names of the natural parents and the prospective adoptive parents to each other, which is contrary to the public policy of the State of New York.

This same principal has been enunciated by the Appellate Division, Third Department of the State of New York in the case of People ex rel. Anonymous v. Saratoga County Dept. of Pub. Welfare, 30 A.D. 2d 756, 291 N.Y.S. 2d 536 (1968), where the court stated that foster parents had no standing to intervene in a habeas corpus proceeding brought by the natural mother to compel the return of a child from a foster parent, because until formal adoption occurred, the relationship under Social Services Law, Section 384 is exclusively between the parent or parents and the agency, and the sole issue involved is the fitness and ability of the parent, without any consideration with respect to the prospective adoptive parent.

Parenthetically, although appellants state (J.S., p. 6) that upon discovery of the New York Supreme Court's determination as to custody, they made application, first to Mr. Justice Ascione, who heard the habeas corpus proceeding in the New York Supreme Court, and then to the Appellate Division, First Department, for leave to intervene in the proceedings, no such applications were ever served upon the attorneys for appellee, Scarpetta.

Argument

II.

THE APPEAL HEREIN DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants argue (J.S., p. 10) that the New York Court's refusal to allow appellants to intervene in the habeas corpus proceeding between appellee, Scarpetta, and appellee, Spence-Chapin, violates the Due Process clause of the Fourteenth Amendment of the United States Constitution.

The opinion of the Court of Appeals of the State of New York (J.S., pp. 30-31) states that the Court found no merit in the contention that the failure to allow the prospective adoptive parents to intervene in the habeas corpus proceedings deprived them of due process of law, because the prospective adoptive parents do not have legal custody of the baby. Legal custody of the baby was vested in appellee, Spence-Chapin, by virtue of the surrender executed by the appellee, Scarpetta. Spence-Chapin had placed the baby with the appellants, who had at best provisional custody. This arrangement, as was pointed out by the Court of Appeals, is subject to the adoption statutes of the State of New York, and in no way conveys any vested rights in the child to the prospective adoptive parents, who are not deprived of a protected interest as contemplated by the Constitution by the refusal to permit them to intervene in the habeas corpus proceedings.

Argument

In support of their argument of a violation of the Due Process clause of the Fourteenth Amendment, appellants cite Armstrong v. Manzo, 380 U.S. 545 (1965). The Armstrong case is clearly inapplicable. In that case the adoption law of the State of Texas required the natural father's written consent to adoption proceedings, with certain exceptions. After Armstrong and his wife were divorced, his wife married Manzo, who sought to adopt Mr. Armstrong's daughter. No notice of the adoption proceedings was given to Armstrong. The United States Supreme Court held that the failure to give the petitioner, Armstrong, notice of the adoption proceedings violated the most fundamental demands of due process of law.

Section 111 of the New York Domestic Relations Law states that the consent of the parent is required in adoption proceedings. This is similar to the Texas law in the Armstrong case, but Section 111 of the New York Domestic Relations Law does not state that notice has to be given to proposed adoptive parents who have no standing in the State courts, only to natural parents.

Section 112 of the Domestic Relations Law of the State of New York governs adoptions from an authorized agency, as in the instant case. This section provides specifically that none of the papers in the proceedings shall state the surname of the child in the title, and that none of the papers required to be signed by the adoptive parents shall contain the surname of the adopted child. To further illustrate the intention of the New York State Legislature to keep the identity of the

natural parents and proposed adoptive parents secret from each other, Section 114 of the Domestic Relations Law of the State of New York requires that no person, including the attorney for the adoptive parents, shall disclose the surname of the child, directly or indirectly to the adoptive parents, except upon order of the Court.

Section 383 of the Social Services Law, subdivision 2, of the State of New York, formerly the Social Welfare Law, states that the custody of a child placed out or boarded out, and not legally adopted, shall be vested during his minority in the authorized agency placing out or boarding such child, and any such authorized agency may in its discretion remove such child from the home or place where boarded.

From the foregoing it would therefore appear that in bringing a habeas corpus proceeding to regain custody of her child, appellee, Scarpetta, could only bring such action against the adoption agency which had custody of the child, and in fact appellee, Scarpetta, as the natural mother, would not know the identity of the proposed adoptive parents under the New York Domestic Relations Law.

The Armstrong case therefore is not applicable, because under Texas law, as under New York law, the natural parent has to be notified of adoption proceedings. There is no such requirement of notice to proposed adoptive parents. Adoptive parents under the New York Domestic Relations Law have no rights until the child is

legally adopted, and the infant Scarpetta has never been legally adopted.

It has been previously pointed out that proposed adoptive parents have no standing in habeas corpus proceedings instituted in the state court by a natural mother against an authorized adoption agency. (See People ex rel. Anonymous v. Saratoga County Dept. of Pub. Welfare, supra.)

The case of Goldberg v. Kelly, 397 U.S. 254 (1970) (J.S., p. 15) cited by appellants is also inapplicable because in the Goldberg case the United States Supreme Court held that the right to receive welfare benefits was an interest protected under the Due Process clause of the Fourteenth Amendment, and that welfare recipients were therefore entitled to a hearing before termination of welfare benefits. In the instant case, appellants have no such protected interest.

In Boone v. Wyman, D.C.N.Y. 1969, 295 F. Supp. 1143, affirmed 412 F.2d 857, certiorari denied 90 S. Ct. 600, 396 U.S. 1024, it was held by the United States District Court for the Southern District of New York that the New York Supreme Court is vested with sole jurisdiction to determine the custody of minor children in the State of New York, and that no substantial federal question was involved.

Conclusion

For all of the foregoing reasons Appellee Scarpetta moves that this appeal be dismissed.

Respectfully submitted,

Joseph Zalk,
Counsel for Appellee, Olga Scarpetta.

APPENDIX A

Remittitur

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of April in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 7, 1971

1. No. 79. 71
The People &c., ex rel. Olga Scarpetta on behalf of Baby Scarpetta,
Respondent,
vs.
Spence-Chapin Adoption Service,
Appellant.

BE IT REMEMBERED, That on the 26th day of February in the year of our Lord one thousand nine hundred and seventy-one, Spence-Chapin Adoption Service, the appellant — in this cause,

came here unto the Court of Appeals, by Simpson, Thacher & Bartlett, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Olga Scarpetta on behalf of Baby Scarpetta, the respondent — in said cause, afterwards appeared in said Court of Appeals by Zalk, Rubel & Perret, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Roy L. Reardon, of counsel for the appellant, and by Mr. Joseph Zalk, of counsel for the respondent, and by Mr. Jacob D. Fuchsberg, of counsel for the amici curiae De Martino, two other briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of

Remittitur

the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, April 7, 1971.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

s/ Raymond J. Cannon
Clerk

APPENDIX B

Order and Judgment Appealed From

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse in the County of New York on the 20th of November, 1970.

Present:

HON. ALFRED M. ASCIONE,

Justice.

THE STATE OF NEW YORK, ex rel. OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

The Writ of Habeas Corpus issued by the Honorable Arnold L. Fein, Justice of the Supreme Court of the State of New York, County of New York, on the 21st day of September, 1970, having come on for hearing at a Special Term, Part XII of this Court on the 2nd day of November, 1970, and a hearing having been held upon said Writ of Habeas Corpus on the 2nd day of November,

1970, and the Petitioner herein, having appeared herein by its attorneys, Zalk, Rubel and Perret, Joseph Zalk, Esq., of counsel, and the Respondent herein, having appeared herein by its attorneys, Simpson Thacher & Bartlett, Roy L. Reardon, Esq., and James Wawro, Esq., of counsel, and the proofs of all parties having been taken and their respective counsels having been heard, and the Court, after due deliberation, having made and filed a decision in writing dated November 16, 1970, awarding custody of Baby Scarpetta to the Petitioner, Olga Scarpetta, from the custody of the Respondent, The Spence-Chapin Adoption Service,

AND, upon reading and filing the aforesaid Writ of Habeas Corpus, the Petition of Olga Scarpetta, sworn to September 18, 1970, and the Return of the Respondent, The Spence-Chapin Adoption Service, duly sworn to on the 27th day of October, 1970, by Loyce W. Bynum, and Petitioner's Exhibit 1 and Respondent's Exhibit A (consisting of 3 papers);

Now, upon motion of Simpson, Thacher & Bartlett, attorneys for the Respondent herein, it is

ORDERED, ADJUDGED AND DECREED that the writ is sustained and Respondent The Spence-Chapin Adoption Service, surrender to the Petitioner, Olga Scarpetta, the infant, Baby Scarpetta, and it is further

ORDERED, ADJUDGED AND DECREED that the execution of this judgment be stayed pending the

determination of the appeal of The Spence-Chapin Adoption Service from this judgment, to the Appellate Division, First Department, on condition that such appeal is perfected for the next available term of such Court, on consent by stipulation dated November 19, 1970.

ENTER,

A.M.A.
J.S.C.

Norman Goodman
Clerk

FILED
NOV 24 1970
County Clerk's Office
New York

APPENDIX C

Order and Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -x

The State of New York ex rel. OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

- -x

SPENCE-CHAPIN ADOPTION SERVICE, the respondent above named, having appealed to the Court of Appeals from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on January 28, 1971, which order affirmed an order and judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on November 24, 1970, sustaining the petitioner's writ of habeas corpus, and directing that the respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA the infant BABY SCARPETTA; and the Court of Appeals having, by an order entered in the office of the Clerk of said Court of Appeals

on April 7, 1971, affirmed the said order of the Appellate Division without costs; and the remittitur of the Court of Appeals having been duly filed herein;

NOW, on motion of Zalk, Rubel & Perret, attorneys for the petitioner herein, it is

ORDERED, ADJUDGED AND DECREED that the respondent SPENCE-CHAPIN ADOPTION SERVICE and NICK F. DE MARTINO and JEAN DE MARTINO, the persons with whom the infant BABY SCARPETTA presently resides, surrender to the petitioner OLGA SCARPETTA said infant BABY SCARPETTA, on May 3rd, 1971 at 10:00 A.M. in Special Term, Part XII, Supreme Court, New York County, 60 Centre Street, New York, New York.

ENTER

s/ Alfred M. Ascione
J.S.C.

NORMAN GOODMAN
Clerk

FILED
APR 28 1971
Co. Clerk's Office
New York

APPENDIX D

Order

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on May 27th 1971.

P R E S E N T:

CHARLES A. LORETO,

Justice.

Index No. 34102/70

(Same Title)

The Petitioner, having moved this Court by an order to show cause granted May 6, 1971 and returnable May 11, 1971, and by a supplementary order to show cause granted May 7, 1971 returnable May 13, 1971, for an order punishing NICK F. DE MARTINO and JEAN DE MARTINO for contempt for their willful disobedience of, and non-compliance with, the order and judgment of Mr. Justice Alfred M. Ascione, made November 20, 1970 and entered November 24, 1970, ordering that respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA, the infant BABY SCARPETTA, and the order and judgment of Mr. Justice Alfred M. Ascione, made and entered April 28, 1971, directing that the respondent SPENCE-CHAPIN ADOP-

TION SERVICE and NICK F. DE MARTINO and JEAN DE MARTINO surrender the infant, BABY SCARPETTA, to the petiioner, OLGA SCARPETTA, on May 3, 1971 at 10:00 A.M. in Special Term, Part XII of the Supreme Court, New York County, 60 Centre Street, New York, New York, in that NICK F. DE MARTINO and JEAN DE MARTINO, the persons with whom the said BABY SCARPETTA resides, have failed to obey and violated the provisions of the said orders and judgments, and said motion having regularly come on to be heard on May 13, 1971,

NOW, on reading and filing the said orders to show cause granted May 6, 1971 and May 7, 1971, the affirmations of Joseph Zalk, one of the attorneys for the petitioner herein, dated May 6, 1971 and May 7, 1971, the orders and judgments of Mr. Justice Alfred M. Ascione dated November 20, 1970 and April 28, 1971, all submitted in support of petitioner's motion, and upon the affirmation of Jacob D. Fuchsberg, dated May 11, 1971, of Fuchsberg and Fuchsberg, the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, submitted in opposition to the said motions, and after hearing counsel for both sides, and after having been advised by Jacob D. Fuchsberg, one of the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, in Chambers on May 24, 1971, that NICK F. DE MARTINO and JEAN DE MARTINO have left the State of New York with the said BABY SCARPETTA, and their attorney stated that they are no longer domiciled in the State of New York, and their whereabouts is unknown and was not disclosed, and due delibera-

tion having been had therein, and upon filing the written decision of the Court,

NOW, on motion of Zalk, Rubel & Perret, the attorneys for the petitioner, it is

ORDERED, ADJUDGED AND DECREED that the motion to punish NICK F. DE MARTINO and JEAN DE MARTINO for contempt of Court be granted to the following extent; and it is further

ORDERED, ADJUDGED AND DECREED that NICK F. DE MARTINO and JEAN DE MARTINO shall return the said BABY SCARPETTA forthwith within forty-eight hours from the date of service as herein specified to the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE, 6 East 94th Street, New York, New York, the said BABY SCARPETTA to be held in the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE subject to the further order of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that service of a copy of this order with notice of entry shall be made upon Fuchsberg & Fuchsberg, 250 Broadway, New York, New York, the last attorneys of record for NICK F. DE MARTINO and JEAN DE MARTINO, and by certified mail upon NICK F. DE MARTINO and JEAN DE MARTINO at their last known home address at 8216 10th Avenue, Brooklyn, New York; and said service shall be sufficient, and it is further

ORDERED, ADJUDGED AND DECREED that upon the filing of affidavit of a party hereto or

his attorney of non-compliance with the provisions of this order, the respondents hereby be adjudged guilty of contempt of this court in having wilfully disobeyed its provisions; and it is further

ORDERED, ADJUDGED AND DECREED under Section 750 of the Judiciary Law of the State of New York, as punishment for said contempt, pursuant to Section 851 of said statute, the said Nick P. De Martino and Jean De Martino be imprisoned in the County Jail for a period of thirty (30) days; and it is further

ORDERED, ADJUDGED AND DECREED upon the filing of affidavit of non-compliance with the provisions of this order by said Nick F. De Martino and Jean De Martino, an order of commitment may issue ex parte to the Sheriff of any county of the State of New York or of the City of New York in which they may be found, directing the said Sheriff to detain said Nick P. De Martino and Jean De Martino in his custody in the common jail of any county, and to be kept therein until their compliance with the terms of this order, or until otherwise discharged by law.

ORDERED that this order or decree may be enforced or modified only in the Supreme Court.

ENTER

s/ C.A.L.
J. S. C.

s/ Norman Goodwin
Clerk